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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 309

VAUGHN H. MITCHELL and
DOROTHY MITCHELL,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

VALENTINE BROOKES,
ARTHUR H. KENT,
PAUL E. ANDERSON,
1720 Mills Tower, 220 Bush Street,
San Francisco 4, California,
Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners, VAUGHN H. MITCHELL and DOROTHY MITCHELL, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals is reported in 213 F. 2d 951, in 54-2 USTC 9449, and in 1954 Prentice-Hall par. 72,647. It is reproduced in the Appendix hereto.

JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals was entered on June 7, 1954. A petition for rehearing filed on July 1, 1954 was denied on August 6, 1954. An order staying the mandate of the Court of Appeals for thirty (30) days was entered on the same date. Jurisdiction of this Court to review the judgment by writ of certiorari is conferred by Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED.

1. In a prosecution for "willful" tax evasion through the medium of an erroneous income tax return prepared for the defendant by a certified public accountant, where the defence was ignorance of error on the part of defendant, is an instruction proper which informs the jury that defendant "must be held to know that which it is his duty to know and which he solemnly promulgated"?

2. In a prosecution for willful tax evasion, is an instruction proper which dispenses with proof of actual knowledge of wrong and substitutes imputed knowledge and a requirement of "ordinary diligence"?

3. In a prosecution for willful tax evasion, is an instruction proper which informs the jury that a criminal act has been committed if a defendant fails to keep books and records sufficient to establish the amount of his net income, and which does not couple that instruction with a charge that such failure is criminal only if willful?

4. Where the defendant in a prosecution for willful tax evasion for the year 1947 had been acquitted four years earlier on similar charges for the years 1942-1946, inclusive, and in the trial for the year 1947 the prosecution gets before the jury evidence that defendant had understated his net income in his returns for the years 1942-1946 and asks the jury to consider those understatements in determining his guilt or innocence for the year 1947, is an instruction proper which permits the jury to speculate about, and decide for itself, his innocence of willful tax evasion for the prior years for which he had been acquitted?

5. May the defence in a criminal case in its examination of a prosecution witness, who was named in the indictment as a co-conspirator, against whom the statute of limitations had not run and who was called by the government as an adverse witness, be deprived of the use of techniques of cross-examination on the ground that the witness is friendly to the defence?

6. May the scope of recross-examination of this same witness properly be restricted by refusal to permit the defence to show that certain testimony favorable to it, elicited on cross-examination, had, contrary to the implication left on redirect examination, also been given to the grand jury?

7. May the trial judge restrict the scope of defendant's recross-examination of this same witness, some of whose grand jury testimony had been read to the trial jury by the prosecutor, by refusing to permit the defence to develop the circumstances in which that grand jury testimony had been given, including intimidation by threat of indictment if she did not cooperate, fatal illness of her husband, and the fact that she had not been subject to cross-examination before the grand jury?

8. Can the defence properly be refused inspection at the trial, preparatory to cross-examination of prosecution witnesses, of statements given by those witnesses to the prosecution during its investigation?

9. Can defence counsel properly be denied all opportunity to see and examine a document being used by the prosecution for the purpose of impeaching the defendant?

10. Can a juror be regarded as impartial, where he had followed the newspaper accounts of the first trial of the same cause, had formed an opinion based on them and did not know whether it still lingered, but would prefer not to be tried to a jury in his frame of mind?

11. Was it proper to exclude evidence that defendant's cash deposits were at the same level in 1949 and 1950 as they were in 1947, where the prosecution had introduced evidence that in 1947 they were lower than they were in 1946 and 1948?

12. In a tax prosecution for 1947, several years after acquittal on similar charges for 1942-1946, is it proper to admit evidence of understatements of income in the returns for the years 1938-1941?

STATUTES AND RULES INVOLVED.

Internal Revenue Code, Section 145.

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

18 U.S. Code, Sec. 371 (62 Stat. 701).

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdeameanor only, the punishment provided for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 16. Discovery and Inspection.

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17(c). For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT OF THE CASE.

Petitioner* is a physician and surgeon practicing in San Francisco, California. He was indicted by a federal grand jury in that city on August 21, 1952, on charges that he "did wilfully and knowingly attempt to defeat and evade" his own federal income tax for 1947 as well as that of his wife Dorothy, and on charges of conspiracy with Dorothy and one Iris M. Cowart to do the same. Dorothy Mitchell was also charged in the indictment, but Mrs. Cowart was not. The indictment specified Internal Revenue Code Section 145(b) and 18 U.S. Code Section 371 as the statutes violated. (R. 3-8.) Both defendants pleaded not guilty (R. 13-14). The jury returned verdicts of guilty against each defendant on every count (R. 22), and on May 12, 1953 judgment and sentence were entered against petitioner, sentencing him to a year's imprisonment and fines totalling $25,000 (R. 34-35).[1]

Notice of appeal to the lower court was filed on May 14, 1953 (R. 39-40), where the judgments were affirmed. The opinion is in the Appendix hereto.

Defendants' 1947 federal income tax returns showed a gross income of $123,000 (R. 1064) and a net income of approximately $85,000 (R. 1067). The prosecution introduced evidence from petitioner's records and patients

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*Dorothy Mitchell did not authorize further proceedings on her behalf until after this petition had gone to the printer. She is referred to throughout by name and Dr. Vaughn H. Mitchell is referred to as petitioner. Nevertheless, this petition is filed on behalf of both parties.

[1]Defendant Dorothy Mitchell was fined $10,000 and placed on five years' probation (R. 36-37).

tending to show that the gross income, and hence the net income as well, was understated by $26,242.75 (R. 528), and while the defence vigorously disputed the accuracy of this particular figure, it did admit an understatement of about $10,000 (R. 1100, 1128, 1134-1137). The prosecution also introduced evidence that the morning cash receipts had been recorded in receipt books separate from the afternoon receipts; that both the morning cash receipts and the morning books had been delivered by Mrs. Cowart, petitioner's bookkeeper, to defendant Dorothy Mitchell, whereas the rest of the cash receipts were deposited in the savings account and the remainder of the books were retained in the office; and that Dorothy Mitchell eventually destroyed the receipt books. There was evidence tending to show that petitioner had had knowledge of the institution of this practice of recording the morning cash receipts separately, although the defence denied such knowledge on his part. The foregoing part of the prosecution's case was built about the testimony of Mrs. Iris Cowart, petitioner's office bookkeeper, who was named in the indictment as a co-conspirator and called by the prosecution as an adverse witness (R. 264).

Other prosecution evidence tended to show that petitioner's accounting system was crude, inadequate and inaccurate. The defence denied only its inaccuracy.

The prosecution also called the agent who had examined petitioner's returns for the years 1942-1946, inclusive, and he testified in some detail as to his findings for those years (R. 255-264, 301-409), even testifying that he had asserted a 50 per cent fraud penalty for those years, a penalty still subject to review (R. 389-390). Petitioner

had been indicted under Section 145(b) for those years as well, but had been acquitted in 1949.

Petitioner has never challenged the sufficiency of the prosecution's evidence to go to the jury. Accordingly, we have not thought it necessary to state the prosecution's evidence in more detail. The defence was that neither defendant knew that the income tax returns were faulty, and that any error was due to inadvertence and inefficiency, not to willful intent. So that the issues raised may be understood, the defence case must be stated in more detail.

The evidence for the defence may be summarized as follows: the defendants' returns for 1947 were prepared by a certified public accountant employed for the purpose (R. 1064). At the time the accountant computed petitioner's estimated tax for 1947, all of the cash receipt books, including the morning books, were available to him in the office (R. 1474-1475). Since he had found that the petitioner's records were not subject to internal control and verification, the accountant proceeded independently of the records and determined petitioner's gross receipts by totalling his bank deposits (R. 1068-1074). At no time did petitioner tell him how to prepare the returns (R. 1074). However, he had not been advised that the morning cash receipts had not been deposited (R. 1078), and hence those receipts did not appear in the returns.

This certified public accountant, who prepared the returns from data selected by himself from petitioner's business records (R. 1073-1076), has not been charged at any time with intentional wrongdoing.

After having prepared the returns, the accountant presented them to petitioner for signature (R. 1162). Both petitioner and his wife signed the returns on the basis of the accountant's figures and made no independent examination of their own to check his computations (R. 1478, 1570-1571, 1662). Neither petitioner nor his wife knew or understood the basis on which the return figures were computed (R. 1477-1479, 1571-1572). At the time he signed the return, petitioner did not know independently of the returns what his income actually was (R. 1600). During 1947, petitioner had been extremely busy with his practice (R. 352-353, 800, 1600), averaging two surgical operations per morning (R. 1587-1588) and seeing 50-60 patients an afternoon (R. 1619). Consequently, he had had very little to do with the bookkeeping of the office and nothing to do with the receipt of fees (R. 352, 800, 1162-1163, 1477, 1589-1590).

Another record of petitioner's gross receipts available to the accountant at the time he filed the returns was the Kardex system (R. 814). Petitioner's accounting system, managed without petitioner's supervision or control (R. 800, 1162-1163), furnished three sets of receipt records: bank deposits, used by the accountant; cash receipt books, part of which were removed from the office after the estimated return for 1947 was prepared; and the Kardexes. The Kardex system consisted of several thousand cards, one for each patient, showing the services performed, amount billed and amount collected. Upon a subsequent totalling of the Kardex entries, petitioner's receipts were discovered to be $10,000 in excess of the amount previously computed from bank deposits and reported on the returns (R. 1099-1100, 1128).

This admitted discrepancy of approximately $10,000 constituted the morning gross receipts which had been delivered to Mrs. Mitchell under an arrangement, at petitioner's agreement, whereby she was to receive from the office $500 a month spending money in addition to household expenses. It was Mrs. Mitchell and Mrs. Cowart who worked out the details of this withdrawal (R. 266-268, 1464, 1638). Mrs. Mitchell insisted that a record be kept of the payments to her, since she was worried over her domestic difficulties with the petitioner. She thought a record would be useful to her in case of divorce proceedings. (R. 266-270, 795, 1456-1466.)

Mrs. Mitchell kept the cash so received by her intact (it totalled $8,770), since she planned to use it as a down payment on a home (R. 1465-1466). In early 1948, after the middle of January, the morning cash receipt books, which contained a record of this cash, were delivered to her by Mrs. Cowart (R. 279-281, 1474-1475). She retained these books until February 16, 1949, when she was advised by a newspaper reporter that the petitioner had been indicted for income tax evasion for 1942-1946. Pregnant at the time, she became hysterical and burned the books, without advising the petitioner of her action (R. 1472-1473, 1481-1485). She retained the cash until September, 1949, when she turned it over to the petitioner and told him of burning the books. He was furious with her (R. 1492-1493, 1607). Prior to that time she had not told petitioner of the amount of money she had taken, nor was he aware of it (R. 1480, 1604).

Accordingly, the defence was one of inadvertent mistake, attributable fundamentally to the inadequacy of the

accounting system and secondarily to omissions of employees and the accountant. Some of the vital defence evidence was squarely contradicted by prosecution evidence, but some of it was contradicted only by circumstantial implication.

As already stated, petitioner had been acquitted in 1949 of similar charges for the years 1942-1946. In his closing argument to the jury, the prosecutor commented about the evidence of understatements in prior years in the following words:

> "In point of fact in the years '38 to '46 Green's investigation ultimately developed that Dr. Mitchell was only reporting about 20 to 25 per cent of his true income.
>
> "For those years Dr. Mitchell reported $106,000 of income and his actual income was $472,000.
>
> "Agent Green's investigation further developed that the system or scheme or whatever you want to call it used by Dr. Mitchell in those years was either not filing a return at all or reporting a nominal amount on the return, which had no relation to what he made.
>
> "So much for '38 to '46. That's the starting point." (R. 1764-5.)
>
> "And, finally, in considering the defense of Dr. Mitchell that he knew nothing, you are entitled to consider the gross understatement—apparently that is an accounting term for when you report 25 per cent of your income—entitled to consider the gross understatement of income for the years 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945 and 1946.
>
> "You can consider those years in passing on the defendant's defense that this whole arrangement in

1947 was an unbelievable and fantastic conglomeration of coincidences; that he never intended to cheat or defraud the government for the year 1947. You can consider his previous history of filing tax returns in passing on that subject.

"So much for the defendant's story." (R. 1805.)

The instructions to the jury concerning those understatements and the prior acquittal were as follows:

"You are instructed that the guilt or innocence of Dr. Vaughn H. Mitchell on charges of tax evasion for the years 1942 to 1946, inclusive, is not to be considered by you in determining his guilt or innocence on the charges which are now before you, nor are you to consider for any purpose whatsoever the result of any previous trial." (R. 1938-1939.)

"The defendants are charged with wilfully attempting to evade income taxes for the year 1947 by filing a false return. Certain evidence has been admitted by me relating to events which occurred in other years. So that there may be no mistake about that, this evidence has been submitted under the rule that acts similar to those charged in the indictment can be proved to show intent when (they) are sufficiently near and so related in kind as to throw light on the question of intent and are closely related and of the same general nature as the transactions out of which the alleged criminal act arose. Evidence of such facts and circumstances, both prior and subsequent, are admissible if not too remote in time." (R. 1944.)

The instructions concerning willfulness, the element in the crime charged to which the defence of inadvertence was addressed, were as follows:

"I instruct you, ladies and gentlemen, that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge to things that are put out in the open and are obvious to him and say, 'I have no knowledge of such facts.' He must exercise such intelligence as he has, and if the evidence shows that he intended to conceal tax liability from the government, then of course he was not acting in good faith." (R. 1941-1942.)

"Now, of course, the owner of a business or the practitioner of a profession need not be the actual bookkeeper to be familiar with the affairs and finances of that business. It will present a somewhat startling situation if a defendant charged by law with the duty of filing a return could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he had sponsored. Of course he would not be liable for innocent clerical mistakes, but he must be held to know that which it is his duty to know and which he solemnly promulgated, and it is for you to determine from all the evidence whether the defendants had knowledge of the falsity of these returns or not." (R. 1945.)

"The duty to file an income tax return is personal. It cannot be delegated to anyone. Bona fide mistakes should not be treated as false and fraudulent, of course. But no man who is able to read and to write and who signs a tax return is able to escape the reponsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else." (R. 1945.)

Seven pages later in the instructions is found the following paragraph:

> "Every person under the laws of the United States, except wage earners and farmers, liable to pay income tax, is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits and other matters required to be shown in any income tax return." (R. 1952.)

Certain other facts are stated subsequently in the statement of reasons for granting the writ.

The Court of Appeals for the Ninth Circuit affirmed the convictions in an opinion found in the Appendix hereto. Although all of the points upon which this petition is based were raised and argued before the Court of Appeals, that court discussed only three of them in its opinion, dismissing each of the other points as a "peccadillo committed by the lower court" not worthy of discussion.

REASONS FOR GRANTING THE WRIT.

1. The decision below is in direct conflict with that of the Court of Appeals for the Fifth Circuit in *Berkovitz v. United States*, decided May 31, 1954, 213 F.2d 468. The *Berkovitz* case held to be reversible error, and the lower court herein approved, the following instruction on willfulness:

> *"The owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business, but he must be held to know*

> ***that which it is his duty to know.*** It is for you to determine from all of the evidence whether the defendant has knowledge of the falsity of this return * * *." (Emphasis from *Berkovitz* opinion, 213 F.2d at 476; record reference herein, R. 1945.)[2]

The context in which this instruction was given herein was not materially different than in the *Berkovitz* case. Each case was a prosecution under Section 145(b). In each the return had been prepared by a certified public accountant. In each the books were kept by an employee, not by the defendant personally. In each the defence was inadvertent, unintentional error. Moreover, in each case the instructions on willfulness contained unexceptionable passages; in fact, those herein were part of the longer good passages in the *Berkovitz* case.

It is apparent, therefore, that a clearcut conflict exists between the circuits.[3]

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[2]This portion of the instruction given herein is part of a longer paragraph reading as follows (R. 1945):

> "Now, of course, *the owner of a business* or the practitioner of a profession *need not be the actual bookkeeper to be familiar with the affairs and finances of that business.* It will present a somewhat startling situation if a defendant charged by law with the duty of filing a return could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he had sponsored. Of course he would not be liable for innocent clerical mistakes, *but he must be held to know that which it is his duty to know* and which he solemnly promulgated, and *it is for you to determine from all the evidence whether the defendants had knowledge of the falsity of these returns* or not."

We have emphasized the portion referred to. The Court will observe that the remainder did not soften the harmful impact of the excerpt, but on the contrary worsened it.

[3]The *Berkovitz* decision was rendered seven days before that herein. It was cited to the court below in the petition for rehearing, which was denied without opinion.

2. (a) The decision below is also in direct conflict with *Hartman v. United States,* (CA 8, July 26, 1954) not yet officially reported but which may be found in 54-2 USTC par. 9522.[4] In the *Hartman* case the following paragraph in the instructions on willfulness was held to be reversible error:

> "The duty to file the return is personal and cannot be delegated. Bona fide mistakes should not be treated as false and fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or somebody else."

The identical[5] paragraph was given in the instant case and was upheld below (R. 1945):[6]

> "The duty to file an income tax return is personal. It cannot be delegated to anyone. Bona fide mistakes should not be treated as false and fraudulent, of course. But no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else."

The issues in the two cases are the same. In each one the indictment was under Section 145(b) and the defense

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[4]This decision came too late to be called to the attention of the lower court.

[5]Except for two slight literary changes.

[6]Presumably this point is among those referred to below as a "peccadillo".

was that others than the defendant had kept the books and prepared the tax returns, so that any error in the latter was inadvertent, so far as the defendant was concerned. The conflict is exact.

(b) The decision below, in upholding these instructions on willfulness, conflicts in principle with decisions of the Third, Fifth, Sixth and Tenth Circuits, and with applicable decisions of this Court. We have reference to *Hargrove v. United States,* (CA 5, 1933) 67 F. 2d 820; *Haigler v. United States,* (CA 10, 1949) 172 F. 2d 986; *Lurding v. United States,* (CA 6, 1950) 179 F. 2d 419; *United States v. Martell,* (CA 3, 1952) 199 F. 2d 670, cert. den. sub nom. *United States v. Martell,* 345 U.S. 917; *Wardlaw v. United States,* (CA 5, 1953) 203 F. 2d 884; *United States v. Murdock,* (1933) 290 U.S. 389; and *United States v. Ragen,* (1942) 314 U.S. 513, 524. Each of those cases but the last one held to be reversible error certain instructions which, while not identical in phraseology to those given herein, nevertheless had the same meaning. The case last cited construed Section 145(b) to require scienter and said it was not "a trap for those who act in good faith." The instructions herein, when all related paragraphs are considered, authorize imputed scienter, and require the defence to be, not good faith alone, but "at least good faith and ordinary diligence" (R. 1945).

Comparison of the instructions herein with the decisions in the *Lurding* (CA 6, 179 F. 2d 419), *Martell* (CA 3, 199 F. 2d 670), and *Wardlaw* (CA 5, 203 F. 2d 884) cases will sufficiently demonstrate the conflict. These cases applied the *Murdock* decision of this Court (290

U.S. 389) in a manner fundamentally in conflict with the decision below. The portion of the instructions herein which we believe in conflict with those cases appears above in the Statement (p. 14) and is reprinted in the footnote.[7]

In the *Lurding* case as here the return was prepared by another person. The following portion of the instructions was held to be reversible error (179 F. 2d at 421):

> "It is immaterial that the return may have been made out by another person or that some other person may have assisted in the making of the return. When a return is signed and filed by a taxpayer it becomes his return and he, in law, is responsible for that return."

The court said that the instruction erred in drawing upon the doctrine of respondeat superior, because that is not a doctrine of criminal law.

Here the jury was told that defendant "must be held to know that which it is his duty to know and which he solemnly promulgated," which is simply another and possibly more emphatic way of repeating the *Lurding*

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[7] "• • • a man may not shut his eyes to obvious facts and say he does not know." (R. 1941.)

"• • • It will present a somewhat startling situation if a defendant charged by law with the duty of filing a return could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he had sponsored. • • • *he must be held to know that which it is his duty to know and which he solemnly promulgated,* • • •.

"The duty to file an income tax return is personal. It cannot be delegated to anyone. • • • no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith *and ordinary diligence* as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else." (R. 1945; emphasis ours.)

error that having signed the return defendant "in law is responsible for that return". The cases are therefore in conflict.

In the *Martell* case, the instruction stated that willfulness was not required in an income tax offence, if the act was done with a bad purpose. The appellate court held that this instruction was too confusing to be sanctioned. Judge Goodrich, for the court, stated (199 F. 2d at 672):

> "(The jury) was left with the impression that one could be convicted for income tax evasion through inadvertent error. * * * A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, * * *. A conviction cannot be sustained unless this state of mind is * * * explained to the jury."

The instructions given herein cannot possibly meet that test. "* * * a man may not shut his eyes to obvious facts and say he does not know." (R. 1941.) Because facts were made to appear obvious to a jury does not necessarily mean they were known to a defendant years before, so his error may have been inadvertent however obvious the reconstructed truth now seems. "It will present a somewhat startling situation if a defendant charged by law with the duty of filing a return could * * * escape punishment by disclaiming knowledge of that which it is his duty to know and which he solemnly promulgated, * * *" (R. 1945). No one hearing these instructions could believe that inadvertence is a defense. These instructions

would, therefore, not be sustained in the Third Circuit, but the Ninth Circuit has upheld them.

Moreover, neither the *Lurding* nor the *Martell* case could possibly be construed to permit an instruction that Section 145(b) requires "at least good faith and ordinary diligence," as the lower courts did herein (R. 1945).

In *Wardlaw v. United States,* supra, 203 F. 2d 884, the Fifth Circuit held that the following instruction was reversible error:

> "The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

Portions of the instructions herein have the same meaning, though different words are used. Thus (R. 1941-1942):

> "* * * a man may not shut his eyes to obvious facts and say he does not know * * *. He must exercise such intelligence as he has, * * *."

Again (R. 1945):

> "* * * he must be held to know that which it is his duty to know and which he solemnly promulgated."

These excerpts are part of paragraphs which, when read in full, do not soften their harmful impact.

It is apparent, accordingly, that there is an essential conflict between the lower court and the Courts of Appeals of the Third, Fifth and Sixth Circuits.

(c) The propriety of these instructions is an important question of federal law which has not been, but should be, settled by this Court. In the court below, the Government stated that they are standard government instructions in Section 145(b) cases.[8] It is evident from the reports of decisions that they are in use throughout the United States. The *Berkovitz* case arose in Florida, the *Hartman* case in Missouri, and the instant case in California, with one paragraph being held reversible error in the *Berkovitz* case, another paragraph being held reversible in the *Hartman* case, and both paragraphs being upheld in this case. Furthermore, these instructions were also given in a case arising in Minnesota, now pending on this Court's docket.[9]

The current flood of income tax prosecutions warrants this Court's review of this case in order that it may determine whether these instructions properly interpret the meaning of the statutory ingredient "willfully". There is nothing novel about the instant case to prevent its being an appropriate vehicle for such examination. It presents in clearcut form the defence of unintentional error, and is essentially similar to all cases where books and records are improperly kept for the defendant by third persons and the return was prepared by others than the defendant. This is a numerous class of cases, probably including most of those where large incomes are involved.

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[8]Page 8, Brief for Appellee, *Mitchell v. U. S.*, No. 13,884, Court of Appeals, Ninth Circuit.

[9]*United States v. Banks*, (D.Minn., 1952) 53-1 USTC 9158, 1953 Prentice-Hall par. 72,355, affirmed on other issues (CA 8, 1953) 204 F. 2d 666, cert. den. 346 U.S. 857, denial vacated and restored to docket June 7, 1954, No. 13, October Term, 1954.

3. The decision below conflicts with applicable decisions of this Court and of another court of appeals. Contrary to *Spies v. United States,* (1943) 317 U.S. 492, the court below approved an instruction which permitted a conviction solely for acts within Section 145(a), whereas the indictment was under Section 145(b). Furthermore, contrary to *Spurr v. United States,* (1899) 174 U.S. 728, and *Brink v. United States,* (CA 6, 1945) 148 F. 2d 325, this instruction failed to instruct the jury that even these acts are not criminal unless done "willfully".

Defendant was indicted for willful attempts to evade in violation of Section 145(b) and for conspiracy to do the same. When this indictment was returned on August 21, 1952 (R. 8), more than three years had elapsed since the commission of the acts charged, which were in 1947 and 1948. Accordingly, the three-year period for proceeding under Section 145(a) had run.

Nevertheless, the instructions contained the following isolated paragraph (R. 1952):

> "Every person under the laws of the United States, except wage earners and farmers, liable to pay income tax, is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits and other matters required to be shown in any income tax return."

This paragraph is not coupled, either expressly or impliedly by reason of context, to an admonition that failure to keep such books and records is criminal only if willful.

Accordingly, this case presents again the error which this Court held reversible in the *Spies* case, compounded

by the error which this Court held reversible in the *Spurr* case, and which a federal appellate court held reversible in the *Brink* case.

The error cannot be excused as a merely inartistic attempt to inform the jury that a failure to keep books and records required by the regulations can, when added to other acts, be evidence of violation of Section 145(b), because earlier the trial judge had already instructed the jury to this effect quite adequately (R. 1942-1943). In fact, that part of the instruction is nearly a verbatim extract from the *Spies* opinion.

In the circumstances, the insertion nine pages later of the paragraph objected to was both unnecessary and harmful. Cf. *Bollenbach v. United States,* (1946) 326 U.S. 607. The jury would probably interpret it to mean something relevant to what they were there to consider, and if it meant anything relevant it could only mean that they were being told that a failure to keep proper records is a criminal act. Since such failure could not alone support the conviction, the instruction was erroneous under the *Spies* case (317 U.S. 492). Furthermore, even the failure referred to is not criminal unless willful, and the instruction's failure to state this qualification is contrary to the *Spurr* case (174 U.S. 728) and the *Brink* case (148 F. 2d 325, 328).

4. The decision below has sanctioned a departure by the trial court from established principles of res judicata, contrary to decisions of this Court in *Sealfon v. United States,* (1948) 332 U.S. 575, and *Emich Motors Corporation v. General Motors Corporation,* (1951) 340 U.S. 558.

Four years earlier, petitioner had been indicted, tried and acquitted on the charge of willful evasion under Section 145(b) for the years 1942-1946, inclusive. Nevertheless, the Government filled the record here with evidence that petitioner's returns for those years had understated his income. The defence did not seek to introduce the evidence which had won acquittal before, but instead relied on evidence of the acquittal.

In his closing argument, the prosecutor referred scathingly to the "system or scheme or whatever you want to call it used by Dr. Mitchell in those years (1938-1946) [of] either not filing a return at all or reporting a nominal amount" (R. 1764, 1765). Then the prosecutor informed the jury (R. 1805) that in considering the defence of inadvertence they could "consider the gross understatement—apparently that is an accounting term for when you report 25 per cent of your income—entitled to consider the gross understatement of income for the years 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945 and 1946."

After this argument had been made to the jury, all that could have prevented the jury from deciding for themselves whether petitioner was really innocent for 1942-1946, or on the contrary was, as the prosecutor contended, guilty of a pattern of unlawful conduct which continued into 1947, was a clear, emphatic instruction from the bench. Instead of instructing the jury as he should have, that they had to accept the verdict of acquittal as conclusive of petitioner's innocent intent in 1942-1946, the judge instructed the jury that:

> "* * * this evidence has been submitted under the rule that acts similar to those charged in the indictment can be proved to show intent when they are sufficiently near * * * and of the same general nature as the transactions out of which the alleged criminal act arose." (R. 1944.)

Concerning the effect of the prior acquittal, the judge charged:

> "You are instructed that the guilt or innocence of Dr. Vaughn H. Mitchell on charges of tax evasion for the years 1942 to 1946, inclusive, is not to be considered by you in determining his guilt or innocence on the charges which are now before you, nor are you to consider for any purpose whatsoever the result of any previous trial." (R. 1938-1939.)

Not a word in the instructions informed the jury that they were not free to speculate about the lawfulness of petitioner's intent in the years 1942-1946, or that the acquittal bound them on that point. They were, on the contrary, told the exact opposite: that they were free to decide the lawfulness of that intent, and they were not "to consider for any purpose whatsoever the result of any previous trial."

The jury instructions approved below therefore fail to reflect properly the principles of res judicata established by this Court in the *Sealfon* (332 U.S. 575) and *Emich Motors* (340 U.S. 558) cases.[10]

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[10]Exception to this instruction was not taken by the petitioner prior to the jury's retirement as required by Rule 30. However, such exception, had it been made, would have been useless since the trial court itself violated Rule 30 by refusing to hear peti-

5. The Court of Appeals has sanctioned departures from the accepted and usual course of judicial proceedings in upholding a ruling that the defence must examine an important prosecution witness as if she were a defence witness, and in upholding restrictions on the scope of petitioner's cross-examination of this witness. Its decision is in conflict with principles enunciated in *Alford v. United States,* (1931) 282 U.S. 687, and *District of Columbia v. Clawans,* (1937) 300 U.S. 617, and in direct conflict with *Arnette et al. v. United States,* (CA 4, 1946) 158 F. 2d 11, *Sandroff v. United States,* (CA 6, 1946) 158 F. 2d 623, *United States v. Michener,* (CA 3, 1945) 152 F. 2d 880, *Lindsey v. United States,* (CA D.C., 1942) 133 F. 2d 368, *Dickson v. United States,* (CA 10, 1950) 182 F. 2d 131, and *United States v. Augustine,* (CA 3, 1951) 189 F. 2d 587.

(a) The witness, Mrs. Iris Cowart, was named in the indictment as a co-conspirator but was not herself indicted, although the statute of limitations was still open at the time of trial. The prosecution called her as an adverse witness and proceeded to cross-examine her. In the course of the defence's examination of her, the prosecutor objected to defence counsel's use of leading questions. The objection was sustained and defence counsel was advised that he should not cross-examine the witness

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tioner's other exceptions (R. 1957). On appeal we relied upon Rule 52(b) and the appellate court below, although mentioning petitioner's failure to comply with Rule 30, passed on the merits of this point. Hence we believe this issue is properly part of this petition.

since she was friendly to the defence (R. 758-759).[11] Subsequent examination of the witness was therefore conducted by defence counsel in the shadow of this ruling, which could be circumscribed by him only at the peril of contempt.

This ruling was sustained by the court below, and represents a square conflict with *United States v. Michener*, (CA 3, 1945) 152 Fed. 2d 884. The issue thus established to be in conflict is not expressly resolved in the Federal Rules of Criminal Procedure,[12] however, the Federal Rules of Civil Procedure,[13] as does the *Michener* case, do permit a party to cross-examine his opponent's adverse witness. Ought the protection afforded a defendant under the criminal rules be less than that granted a party under the rules of civil procedure?

(b) The appellate court also created a direct conflict with the holding in *Arnette v. United States*, (CA 4, 1946)

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[11]Defence counsel objected to the ruling on the ground that the witness was called as a co-conspirator, and was told: "You will ask direct questions." He inquired, "And treat this witness as practically—I mean, I may not cross-examine?" The trial court answered, "That is correct." (Appendix, pp. vii, viii, and R. 758-759.)

[12]The only rule which bears on this issue—the right of the defence to cross-examine an adverse witness called by the prosecution—is Rule 26, which states that matters of trial procedure "shall be governed * * * by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."

[13]Rule 43(b), Federal Rules of Civil Procedure.

158 Fed. 2d 11, when it affirmed the trial court's action in denying the defence the right to ask leading questions.[14]

Furthermore, in the circumstances prevailing herein, Mrs. Cowart's interests were fully as adverse to petitioner as if she had been named co-defendant. Any restriction on petitioner's cross-examination of such a witness which operates as if she were petitioner's own witness is contrary to *Sandroff v. United States,* (CA 6, 1946) 158 Fed. 2d 623, and to the implications of the portion of *Glasser v. United States,* (1942) 315 U.S. 60, which holds that co-defendants are adverse parties.

6. The scope of recross-examination was seriously restricted. On redirect, the prosecutor had read to the trial jury extensive extracts from this witness' testimony before the grand jury, for the evident purpose of creating the impression that certain favorable testimony the defence had elicited on cross-examination was in conflict with her grand jury testimony. On recross, therefore, the defence sought (1) to rehabilitate that favorable testimony, and (2) to weaken the impact of the grand jury testimony by showing the circumstances in which it had been given. Efforts toward the first objective were so completely frustrated by repeated rulings abridging the scope of the recross that defence counsel thought that the judge did not understand what he was trying to do and sought leave to make an offer of proof, in chambers if desired. He was not permitted to do so. (R. 830-831.)

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[14]In the instant case the Government succeeded in denying the defence a right it had successfully claimed for itself. We do not believe another case can be found where a party has successfully claimed the right to examine its own witness on more favorable terms than those accorded the opposition.

Eventually, driven to desperation, in order to establish that the witness had not created this testimony since the time she had appeared before the grand jury, defence counsel offered the entire grand jury transcript in evidence. Since the prosecutor had already unsuccessfully offered it himself, he acquiesced and in it went (R. 841).

The refusal to permit rehabilitation of favorable testimony from a witness called by the prosecution as an adverse witness is in direct conflict with *United States v. Michener*, (CA 3, 1945) 152 F. 2d 880. We submit that the error was not cured by defence counsel's introduction of the entire grand jury transcript, but was on the contrary compounded by it. He should not have been forced to introduce prosecutor's evidence as the price of introducing defence evidence.

7. In seeking to bring out the circumstances in which Mrs. Cowart had given that grand jury testimony, the defence was improperly restricted and did not succeed in overcoming the restrictions. In upholding these restrictions, the appellate court decided the case in conflict with decisions of this Court and of other courts of appeal.

One restriction approved below is substantially identical to the one for which this Court reversed the same court in *Alford v. United States*, (1931) 282 U.S. 687. The defence was denied the right to bring out possible bias of the witness attributable to intimidation by the prosecution. The witness had admitted on cross examination that Government agents had told her that she had the choice of cooperating or being indicted herself (R. 806-810). Defence counsel was not permitted on recross to show that the grand jury testimony read to the jury on

redirect had been given after the witness had been presented with that choice. (R. 833-834.) In approving this restriction, the decision below is in direct conflict with *Sandroff v. United States,* (CA 6, 1946) 158 F. 2d 623, 629,[15] as well as with the *Alford* case.

Further conflict with the *Alford* case is present in the appellate court's approval of the trial judge's refusal to permit the defence to show the setting in which Mrs. Cowart had given that grand jury testimony. Defence sought to show that Mrs. Cowart had been distraught with worry over her husband's illness and anxious to spare him as much as possible (he died from cancer during the course of the trial), thus suggesting the extent of her willingness to cooperate with the prosecution. Defence also sought to show that her grand jury testimony which the trial jury had heard had not been cross-examined by anyone representing either the defence or Mrs. Cowart. Both lines of cross-examination were restricted *in limine.* (R. 827; R. 824-826.) In addition to conflicting with *Alford,* the approval of these restrictions conflicts with *Dickson v. United States,* (CA 10, 1950) 182 F. 2d 131, and with *United States v. Augustine,* (CA 3, 1951) 189 F. 2d 587.

The appellate court herein stated that these restrictions were within the discretion of the trial court to impose. The court mistook the rule governing the extent of cross-examination for that governing its scope. The discretion over the former gives no right to cut off *in limine* all cross-examination in fields where it is appropriate.

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[15]The Sandroff case reversed a conviction for restrictions on the cross-examination of a co-conspirator who had not been indicted.

The decision below therefore disregards rules settled in *Alford v. United States,* (1931) 282 U.S. 687, *District of Columbia v. Clawans,* (1937) 300 U.S. 617, 632, and correctly applied in other circuits in *Lindsey v. United States,* (CA D.C., 1942) 133 F. 2d 368, *United States v. Cohen,* (CA 3, 1947) 163 F. 2d 667, and *Dickson v. United States,* (CA 10, 1950) 182 F. 2d 131.

8. The Court of Appeals sanctioned the refusal to permit defence counsel to inspect written statements, presumably in question and answer form, taken by the prosecution of its witnesses. The request to inspect was made by defence counsel during his cross-examination of the witness. In each instance it was denied, and neither the record nor the defence knows what those statements contain. (R. 595-598; R. 598-605.)

The ruling below conflicts with the decision of this Court in *Gordon v. United States,* (1953) 344 U.S. 414, and with that in *Fryer v. United States,* (CA D.C., 1953) 207 F. 2d 134, cert. den. sub nom. *United States v. Fryer,* 346 U.S. 885, reh. den. 346 U.S. 928. While the statements are foreign to the record and therefore, unlike in the *Gordon* case, may not be inconsistent with the testimony given on the stand, this Court appeared to consider, as the lower court had held, that proven inconsistency was an impediment to be overcome rather than a basis for its decision. In the *Fryer* case no inconsistency was shown, nor could it have been, since the demand there was made prior to trial. We believe the rule applies with equal force to demands for inspection made during trial and those made before trial. The *Gordon* case involved a demand first made during trial.

9. The Court of Appeals has sanctioned such a far departure from the accepted and usual course of judicial proceedings as to call for the supervisory power of this Court, in upholding the denial of defence counsel's request to inspect and examine a document being used by the prosecutor for the purpose of impeaching petitioner. Petitioner took the stand in his own defence and on cross-examination was shown selected passages of a statement he had given the Government, and was examined about them by the prosecutor. Defence counsel demanded inspection of them, but was refused. (R. 1686-1691.) Defence counsel was even denied the right to have the document marked for identification. (R. 1690-1691.)

These rulings improperly abridged petitioner's right to be effectively represented by counsel. In the appellate court the Government argued that no harm was done because the statements had been shown to petitioner, though not to his counsel.[16] Petitioner cannot, however, be constitutionally required to undertake the conduct of his own defence. In this aspect, the action of the lower courts conflicts in principle with *Glasser v. United States,* (1942) 315 U.S. 60, and *United States v. Venuto,* (CA 3, 1950) 182 F. 2d 519.

In any aspect, petitioner was not afforded his proper right to see the entire document and to offer any passages which explain or assist his testimony, or remove apparent inconsistencies. This right has been fundamental at least since *The Charles Morgan v. Kouns,* (1885) 115 U.S. 69, 77, and *Chicago, M & S.P. Ry Co. v. Artery,* (1890) 137 U.S.

[16]Pages 41-42, Brief for Appellee, below.

507, 520. It was necessary for petitioner's fair trial that he be given the opportunity to show, as he claimed was the case (R. 1688-1689), that the prosecutor was taking extracts from the prior statement out of context. Neither petitioner nor his counsel was given the right to use the statement to rebut or explain the implications of inconsistency the prosecutor sought to create. Fundamentally, it appears to us, due process requires this much.

10. The lower court decided *sub silentio* an important question of federal law which has not been but should be settled by this Court.

A juror, who ultimately became foreman, was sworn over petitioner's challenge for cause. He admitted that he had followed closely the newspaper accounts of the first trial, had formed an opinion of petitioner's guilt or innocence, and stated that he did not know whether or not he unconsciously retained an opinion (R. 58). At the request of defence counsel,[17] the judge asked him if he "would * * * be willing to have your case determined and passed upon by a jury composed of 12 people whose frame of mind is the same as yours at the present time?" He replied, "I would be willing, but I wouldn't prefer it." Another question was put: "Would you prefer not to?" The answer was, "I would prefer not to. I would prefer to have it tried by the judge." (R. 59.)

The juror's replies to these final questions would have disqualified him in the state courts of California. *Fitts*

[17]The District Court rules provide that the court alone will examine prospective jurors. Rule 14, Rules of U.S. District Court for Northern District of California.

v. Southern Pac. Co., (1906) 149 Cal. 310, 86 Pac. 710. His admission that he had formed an opinion from newspaper accounts of the first trial which might still linger would have disqualified him in the state courts of New York. *People v. McQuade,* (1888) 110 N.Y. 284, 18 N.E. 156, 1 L.R.A. 273. The issue may then fairly be said to be whether the courts of our two largest states apply higher standards than do the federal courts.

The precise questions asked and satisfactorily answered in *Reynolds v. United States,* (1879) 98 U.S. 145, and *The Anarchists' Case,* (1887) 123 U.S. 131, 173-174, were not asked here. The answers given here would not disclose how the questions asked in those cases would have been answered here.

Not since those two cases, decided over 65 years ago, has this Court considered this problem. The increase in media of news reporting and in volume and complexity of news reported, with the attendant problems of jury selection, warrant this Court's consideration of this problem in the light of present day conditions. This case, where a juror had formed an opinion from close reading of accounts of a prior trial, not merely from the fragmentary accounts of the issues attendant on indictment and arrest, is an appropriate vehicle for such consideration.

11. The lower courts denied petitioner a fair trial in refusing to permit him to introduce evidence which would have overcome the effect of one aspect of Government's case. They did so apparently under the misconception that there is a rule of law requiring the exclusion of evidence of events after the period of the indictment. If so, their decisions conflict with *Johnson v. United States,*

(1943) 318 U.S. 189, 195-196. This issue presents an important question of federal law which should be settled by this Court.

The prosecution showed that petitioner's cash deposits were substantially larger in both 1946 and 1948 than in 1947, the year involved. This showing was emphasized by U.S. Exhibit 33, a large and colored chart prominently displayed for the jury, and by testimony of a revenue agent that the discovery of this variation was what initially aroused his suspicion. (R. 75, 131.)

The defence sought to neutralize the impact of these facts by showing that the 1946 and 1948 cash deposits were substantially larger than those in 1949 and 1950 as well, and the latter bore a close relation to those in 1947. This evidence was ruled out. (R. 1144-1146, 1149-1151, 1156-1160, 1319.)

The evidence would have been very helpful to petitioner. It would have showed that there was not such an unvarying relation in petitioner's cash deposits as the prosecution's point assumed, and also that the 1947 deposits were closer to the five-year average than were those the prosecution had chosen to use for comparison. The evidence was not discredited by any showing indicating that conditions in 1949 and 1950 differed from those in 1947. It was rejected apparently because it related to subsequent years.

The basis for rejection is unsound. Subsequent events can be significant and where they are evidence showing them is admissible. *Johnson v. United States,* (1943) 318 U.S. 189, 195-196.

Moreover, the Government's own evidence related to 1948, itself a subsequent year. Is evidence from a subsequent year admissible only if it is damning?

The excluded evidence on its face carried a strong flavor of authenticity. It related to 1949—a year in which petitioner was tried and acquitted on similar charges for prior years—and 1950, a year in which petitioner knew his 1947 affairs were under investigation. If low deposits were evidence of guilt, it is at least improbable he would have made falsely low deposits in those subsequent years, of all years.

This rule of law should be clarified so that errors of this sort will not occur again.

12. Although evidence of innocence relating to 1949 and 1950 was excluded, evidence of guilt relating to 1938-1941 was admitted in this trial for 1947. The admitted evidence was that petitioner had understated his income in his returns for those years. It was admitted notwithstanding that the defence objected to it on grounds of remoteness and tendency to establish guilt of another crime. The approval of this ruling conflicts directly with *Boyer v. United States,* (CA D.C., 1942) 132 F. 2d 12, and in principle with *Hartman v. United States,* (CA 8, July 26, 1954) not yet officially reported but unofficially reported in 54-2 USTC par. 9522.

CONCLUSION.

The writ of certiorari should be issued.

Dated, San Francisco, California,
August 23, 1954.

VALENTINE BROOKES,
ARTHUR H. KENT,
PAUL E. ANDERSON,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix

United States Court of Appeals
For the Ninth Circuit

Vaughn H. Mitchell and Dorothy Mitchell, Appellants, vs. United States of America, Appellee.	No. 13,884 Jun. 7, 1954

Appeal from the United States District Court for the Northern District of California, Southern Division

Before HEALY, ORR, and LEMMON, Circuit Judges.

LEMMON, Circuit Judge

It is familiar technique for an appellant to seize upon every peccadillo committed by the lower court and magnify it until it becomes a blunder of major proportions.

The present case is no exception.

Although nine errors have been specified in this appeal, only three need be discussed.

The most serious objection is that the trial judge did not allow appellants' counsel to cross-examine one of "the prosecution's key witnesses".

The appellee replies that, on the contrary, there was full cross-examination by the defense. It is pointed out

that the witness in question was friendly to the appellants, and that the lower court limited the appellants' use of leading questions addressed to her.

Properly to evaluate this asserted error, it must be considered in its factual setting.

1. *Statement Of The Case.*

The indictment was based upon 18 USCA §371 and 26 USCA §145 (b). The appellant Vaughn H. Mitchell was convicted on three counts. Counts 1 and 2 charged him with attempting to defeat and evade a large part of an income tax due by him and his wife, Dorothy Mitchell. Count 5 charged that he and his wife conspired to evade and defeat a part of their income tax. Counts 3 and 4 charged Dorothy Mitchell with attempting to defeat and evade a large part of her income tax, and Count 5 charged her with conspiracy, as above stated. She likewise was convicted on the three counts in which she was accused. All five counts of the indictment related to the income tax for the calendar year 1947. In round figures, it was alleged that $26,000 of net income was concealed and $18,000 of tax was evaded. The indictment was filed on August 21, 1952.

Named in the indictment as a conspirator but not as a defendant was Iris M. Cowart, whose testimony, which will be fully discussed hereinafter, played an important part in the case. On August 11, 1950, she was notified by the Bureau of Internal Revenue at San Francisco that "This office has under consideration a recommendation involving the institution of criminal proceedings against you."

2. *The Evidence.*

Only so much of the evidence will be summarized as will indicate the importance of the testimony as to which it is complained that full cross-examination was not permitted.

Dr. Vaughn H. Mitchell, one of the appellants herein, is a practicing physician and surgeon in San Francisco. Mrs. Cowart was his employee from 1943 to 1948. During the crucial year of 1947, she "took care of the Kardexes, . . . the billing and the banking," handling the money and making deposits, and "keeping the accounts". She said that she was "not a bookkeeper".

Mrs. Cowart testified that in 1947, probably in January, she had a conversation with Mrs. Mitchell "with respect to keeping two records of the books or giving her some money . . . . She was to get the morning receipts, and I also confirmed it with Dr. Mitchell. . . . I asked him if it was correct that I was to give Dorothy some money from the office, and he said that was correct and to keep a record of it."

Mrs. Cowart added that she and Mrs. Mitchell "discussed keeping the morning receipt as she (Mrs. Mitchell) was to have them, and then to keep a record of it in a receipt book and to put my initials on the book of the money" that she gave Mrs. Mitchell. The witness's best recollection was that Dr. Mitchell told her to keep the morning receipts in one set of books, and to change in the middle of the day, although she was not sure whether she got "that impression from the conversation with Dorothy Mitchell".

At any rate, Mrs. Cowart recalled Dr. Mitchell's saying that "he wasn't putting all the money in one account in the bank, that Dorothy Mitchell was to have some of the money".

The witness said that she kept "two receipt books", "one for the morning receipts and one for the afternoon receipts". At about 1 o'clock in the afternoon, she "switched receipt books", "from the morning book to the afternoon book". "The money from the morning book was given to Mrs. Mitchell, and the afternoon book was deposited as it always had been." Mrs. Mitchell would come to the office once a month or once every six weeks to pick up the money.

Mrs. Cowart continued to hand money to Mrs. Mitchell throughout the year 1947, during which time the witness delivered "not over $15,000" to the doctor's wife.

This unique system of "double entry bookkeeping" ended in December, 1947. In the latter part of January or February, Mrs. Cowart took the six or seven "morning receipt books" to Mrs. Mitchell at the latter's apartment. Mrs. Cowart had planned to leave Dr. Mitchell's employ at the end of December, 1947, but there was difficulty in getting a girl to replace her, and she actually quit at the end of February, 1948.

The appellee not only concedes that Mrs. Cowart was an important witness against Dr. Mitchell, but it emphasizes the damaging nature of her testimony. In its brief, the appellee says:

> "At the trial the testimony of Mrs. Cowart established Dr. Mitchell's participation in every important

phase of the scheme—its initiation . . . , suspension during Mrs. Cowart's vacation . . . , termination at the end of the year . . . , and delivery of the hidden set of cash receipt books to Mrs. Mitchell . . ."

3. *The Trial Judge Did Not Unduly Restrict Defense Counsel's Cross-Examination of Mrs. Cowart.*

In the official transcript of record before us, defense counsel's entire questioning of Mrs. Cowart is labeled "Cross-Examination". This, of course, is not conclusive that the Court permitted an adequate cross-examination of the witness. To determine this question, a careful analysis of the queries propounded to her is necessary, as well as some examination of the factual background.

Mrs. Cowart had testified before the grand jury that had brought in the present indictment, and at the trial was called as an adverse witness by the appellee. Dr. Mitchell was her physician, and she was a close personal friend of Mrs. Mitchell, whom she had known for fifteen years. Mrs. Mitchell herself testified regarding the relationship between the two women: "We are exceptionally good friends". It will be observed that Mrs. Mitchell here used the present tense, and was not referring merely to the feeling that existed between the two women before the income tax troubles arose.

Defense counsel examined Mrs. Cowart at great length. After the questioning had proceeded for several minutes —represented by ten pages of the printed transcript— Mrs. Cowart was excused from the stand when a message was received by the Court that her husband was in a dying condition at a local hospital.

Eight days later, the examination was resumed, continuing for 12 more transcript pages before it was interrupted by counsel for the appellee. It should be noted that from the very beginning of his questioning of the witness, up to the time of the interruption, the defense attorney himself had repeatedly referred to his queries as "cross-examination".

The interruption came when the defense attorney started to question Mrs. Cowart as to how money was being deposited (presumably by Dr. Mitchell) in 1947. The transcript shows that the following colloquy occurred:

"Q. Do you remember whether Appling (Special Agent) or Green (Internal Revenue Agent), either singly or together, any way, around the first of April of 1947 asked you anything about how money was being deposited in 1947, all the money was being deposited?

"A. No, I don't remember that.

"Q. To the best of your recollection was any such conversation ever had with you by either Green or Appling?

"A. No.

"Q. As a matter of fact, at that time, Mr. Green (sic), in the spring of 1947, they were concerned with and investigating 1947 and 1946, isn't that right?

"Mr. Fleming (counsel for the appellee). Well, I object to this.

"Mr. Dana (counsel for the appellants). I am asking if she knows.

"Mr. Fleming. Mr. Dana is testifying, not even asking the questions.

"Mr. Dana. This witness is for the purpose of cross-examination.

"Mr. Fleming. This is an adverse witness, and I will object to this as a leading question. Leading questions are normally permissible under cross-examination. However, that rule is subject to an exception where the witness proves to be in favor of the party who is the cross-examiner, and the danger of leading questions——

"The Court. Sustained.

"Mr. Dana. Let me clarify it, so I won't abridge your Honor's ruling, trespass on your Honor's ruling:

"This lady is put into the case as an alleged conspirator by the Government, called by them, and a lot of hearsay testimony admissible under that rule of conspiracy has been introduced. I don't believe I am limited to the rule of a person asking questions as a direct examiner, they bringing her here, I didn't.

"The Court. They brought her here in the capacity of an adverse witness and so announced to the Court.

"Mr. Dana. They call her a conspirator. Am I not allowed to cross-examine her? I will abide by the Court's ruling, but it seems to me I shouldn't be placed in that position.

"The Court. *You will ask direct questions.*

"Mr. Fleming. Mr. Dana can call the witness himself as his own witness and question fully in regard to these things.

"Mr. Dana. I will determine the defense, subject to the Court's ruling.

"The Court. *I have already ruled. You shall ask direct questions.*

"Mr. Dana. And treat this witness as practically —I mean, I may not cross-examine?

"The Court. That is correct.

"Mr. Dana. Very well, your Honor, I will abide by that."

Nevertheless, defense counsel did not give up trying. Fourteen times he asked Mrs. Cowart questions to which the attorney for the appellee objected as leading. Each time the Court sustained the objection.

Nor did the Court's sustaining of the objections defeat defense counsel in his attempts to ask questions that he believed might elicit the information he desired. The very first of the fourteen questions referred to above is typical. Referring to the plan to keep separate receipt books, already outlined, counsel asked:

"Q. Do you remember the substance or can you remember with any particularity your conversation with Dr. Vaughn Mitchell concerning this?

"A. Well, I believe I asked him if it was right that Dorothy was to have some money from the office, the morning receipts, and kept in a separate—and give her receipt book or something to that effect. I can't remember any exact conversation that I had, how it was worded.

"Q. Was the word 'receipt book' or the word a 'separate'——

"Mr. Fleming. The question is leading, if the Court please.

"The Court. Sustained."

Thereupon, counsel reframed the question as follows:

"Q. (By Mr. Dana): Can you tell us whether or not the word 'receipt book' was used or the word (sic) 'a separate account of it'?"

To this question, no objection was made, and the witness gave her answer.

It is well settled that the extent of cross-examination and the restriction of the use of leading questions rest in the sound discretion of the trial court. St. Clair v. United States, 1894, 154 U.S. 134, 150; Alford v. United States, 1931, 282 U.S. 687, 694; Glasser v. United States, 1942, 315 U.S. 60, 83.

The object of examination is to get the facts. Whether direct or cross questions best serve that end depends upon circumstances. The trial judge is in a better position than is this Court to determine the precise point at which the asking of leading questions should be brought to a halt. He sees the witness and hears the testimony, and thus has a better opportunity to assess the true situation existing at any given posture of the case, than can we from the cold record. The discretion of an experienced trial judge in this, as in other respects, should not be lightly disregarded.

We find that the trial court did not abuse its discretion in limiting the cross-examination of Mrs. Cowart.

4. *Testimony Relating To Dr. Mitchell's Income Taxes For 1942-1946 Concededly Was Admissible, And The Appellants Are Not In Position To Complain of The Instructions Thereon.*

On February 16, 1949, Dr. Mitchell was indicted on five counts on the charge that he "did wilfully and knowingly attempt to defeat and evade" his income tax for the years 1942-1946, inclusive. A sixth count charged that he "attempted to defeat and evade" Mrs. Mitchell's income tax for 1946. All six counts were based on 26 USCA § 145(b). Dr. Mitchell was acquitted on all counts.

Much evidence was introduced by the appellee concerning the investigation for 1942-1946. The appellants "have . . . not challenged the admissibility of the evidence, but merely the failure of the trial judge to instruct the jury properly about the inferences that could be drawn from it".

The relevancy of this evidence is clear. The record shows that on November 5, 1946, Agent Green had the following conversation with Dr. Mitchell:

> "A. I told the doctor that I had just finished adding up the bank deposits for the years 1942 through 1945 and had compared them with the gross receipts as reflected on his tax returns for those years and had found a large discrepancy.
>
> "Q. What did he say to that?
>
> "A. He asked me if I had any idea of what the figure was, and I told him I could only give him a very preliminary estimate and the figure I quoted to him was $100,000.
>
> "Q. And how did you tell him you had arrived at that figure?
>
> "A. I told him I had arrived at it by totalling the bank deposits.
>
> • • •
>
> "He asked—I don't remember whether it was just at that very moment or a little while later if he asked that—that he asked whether he should have an accountant.
>
> • • •
>
> "I told him that since the girls had mentioned and had told me that all money that was taken in by the profession was deposited and that all expenses of his practice were paid by check, that an accountant would not be necessary *because they get the figures right*

from the bank account and right from the checking account and that if there was any problem that they ran into I was available for him as we are in all cases.

"Q. Did you say what figures could be used for gross income?

"A. I told him that the bank deposits, since I had been informed all money was put in that account or accounts, would be the basis of his gross receipts."

As has already been stated, there is evidence that the appellants, in January, 1947, evolved the scheme relating to the double sets of cash receipt books. Since that plan was hatched a month or two after the above conversation with Agent Green, it is the appellee's theory that the appellants' ingenious double-book plot was unwittingly suggested to them by Agent Green. In other words, under the new scheme, the bank deposits would *no longer* reflect the Doctor's gross income.

The above-quoted testimony of Green supports that theory and was properly admitted.

The appellants, however, specify as error the trial court's failure to instruct the jury that Dr. Mitchell's acquittal on similar charges for the years 1942-1946 "conclusively established that no wilful attempt to evade taxes had been made in those years".

The court charged as follows:

"You are instructed that the guilt or innocence of Dr. Vaughn H. Mitchell on charges of tax evasion for the years 1942 to 1946, inclusive, is not to be considered by you in determining his guilt or innocence on the charges which are now before you, nor are you to consider for any purpose whatsoever the results of any previous trial."

The appellants do not deny that they failed to comply with Rule 30 of the Rules of Criminal Procedure, in that they did not object to this instruction before the jury retired, *"stating distinctly the matter to which"* they objected and *"the grounds"* of their objection. They assert, however, that they "brought out this point sharply on their argument for a new trial". Such an objection, of course, is not a compliance with Rule 30. Neither is it a compliance with our Rule 18(2)(d), which provides in part:

> "When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, *together with the grounds of the objections urged at the trial.*" (Emphasis supplied.)

The instruction complained of dealt with a special fact-situation of the case at bar, and was not of a "stock" nature. It was therefore of a type that comes peculiarly within the sweep of Rule 30, as was pointed out at some length by us in the recent cases of Kobey v United States, 9 Cir., 1953, 208 F 2d 583, 587-588, 597-598, and Benatar v United States, 9 Cir., 1954, 209 F 2d 734, 743-745, certiorari denied May 24, 1954.[1]

But even if the instruction in question were to be considered on its merits, it would be found that the appellants have no substantial cause for complaint. Their own brief sets forth that the evidence "about the Doctor's

[1]See also Boyd v United States, 1926, 271 U.S. 104, 108, and Ziegler v United States, 9 Cir., 1949, 174 F 2d 439, 448, certiorari denied, 1949, 338 U.S. 822.

understatement of income in his return (was) for the avowed purpose of establishing a pattern of wilful conduct which persisted into the year in question." The instruction thus frustrated the appellee's strategy completely, for the trial court bluntly and unqualifiedly told the jurors that they were not to consider the question of guilt or innocence under the 1942-1946 charges against Dr. Mitchell *"in determining his guilt or innocence on the charges which are now before you"*.

Finally, a study of the record convinces us that the jury could have had no doubt of Dr. Mitchell's acquittal on the earlier charges.

5. *Evidence Of Deficiencies In Income Taxes For The Years 1938-1941 Was Properly Admitted Against Dr. Mitchell.*

The appellants also complain that "The Court committed reversible error in permitting the prosecution to introduce evidence, over objection, of deficiencies" in Dr. Mitchell's income taxes for the years 1938-1941, inclusive.

As to Dr. Mitchell himself, the evidence was admissible, relating as it did to "other transactions or a course of fraudulent conduct . . . to establish fraudulent intent as an element of the crime charged." Michelson v. United States, 1948, 335 U.S. 469, 475-476, note 8.[2]

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[2]See also McCoy v United States, 9 Cir., 1948, 169 F 2d 776, 783, certiorari denied, 1948, 335 U.S. 898; Himmelfarb v United States, 9 Cir., 1949, 175 F 2d 924, 941, certiorari denied, 1949, 338 U.S. 860; Norwitt v United States, 9 Cir., 1952, 195 F 2d 127, 133, certiorari denied, 1952, 344 U.S. 817.

With regard to how remote such similar acts may be in point of time, the discretion of the trial court is broad. In II Wigmore on Evidence, Third Edition, 1940, Section 316(2), Page 217, we find the doctrine thus stated:

> "(2) The *length of time* over which we may range in search of evidential instances is obviously determinable by no fixed rule. The precedents illustrate various lengths of time. The discretion of the trial Court should here control."

As to Mrs. Mitchell, the appellants assert that "Dorothy Mitchell had no connection whatsoever with the Doctor's tax returns and tax liabilities for the years 1938-1941. She did not marry him until 1944." No objection on Mrs. Mitchell's special behalf, however, was made by the appellants to the admission of this testimony: counsel merely remarked that he didn't "believe that is material to this, to anything in this inquiry". Furthermore, the jury was in no way misled, for the questioning on this subject repeatedly specified Dr. Mitchell only: "Now, with respect to 1938, will you tell us what was the amount reported by Dr. Mitchell?", "Will you tell me how much was reported by Dr. Mitchell in 1940?", "These (figures) represent, as I understand it, the actual income that you determined in your investigation in the spring of 1947 that the Doctor made in 1938, 1939, 1940 and 1941?", etc. There was no prejudicial error here.

6. *Conclusion.*

The appellants specify a number of other asserted errors, which need not be discussed here. We have considered them all and find that they exhibit no reversible error.

This Court is convinced that each appellant received a fair trial, and that there was abundant evidence to support their conviction. Each judgment is therefore

Affirmed.

(Endorsed:) Opinion. Filed Jun. 7, 1954.
Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

Vaughn H. Mitchell and Dorothy Mitchell, Appellants, vs. United States of America, Appellee.	No. 13,884

JUDGMENT

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this Cause be, and hereby are affirmed.

(Endorsed) Judgment

Filed and entered June 7, 1954,

Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 309

VAUGHN H. MITCHELL AND DOROTHY MITCHELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. i-xv) is reported at 213 F. 2d 951.

JURISDICTION

The judgment of the Court of Appeals was entered June 7, 1954 (Pet. xvi), and a petition for rehearing was denied August 6, 1954 (R. 2026). The petition for certiorari was filed August 27,

1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court, in instructing the jury on the element of "wilful intent" in the offense of attempted income tax evasion, deprived petitioners, in effect, of the defense of inadvertent mistake.

2. Whether the trial court, in instructing the jury that all taxpayers are required to keep adequate records, erred in neglecting to add that the failure to maintain such records is criminal only if wilful.

3. Whether the jury were either asked by the prosecution or permitted by the trial court to speculate about Dr. Mitchell's guilt or innocence on previous income tax charges of which he had been acquitted.

4. Whether the defense was unduly restricted in its cross-examination of Mrs. Cowart.

5. Whether the trial court committed an abuse of discretion in refusing to grant petitioner's requests, in the form in which they were presented and at the time they were made, to examine written statements of Mrs. Pierson, Mrs. Cowart and Dr. Mitchell which the Government had in its file.

6. Whether the trial court erred in refusing to disqualify a juror who, from reading newspaper accounts of a previous trial, had formed a tentative opinion as to petitioners' guilt.

7. Whether the trial court erred in excluding evidence of petitioners' cash deposits in 1949 and 1950, and in admitting evidence of Dr. Mitchell's income tax deficiencies for 1938 to 1941, inclusive.

STATUTES AND RULE INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

18 U.S.C.:

Sec. 371. *Conspiracy to commit offense or to defraud United States.*—If two or more persons conspire either to commit any offense

against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

* * * * *

* * *. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On August 21, 1952, a five count indictment was filed against petitioners, who are husband and wife, in the United States District Court for the Northern District of California. The first and second counts charged Vaughn H. Mitchell with wilful attempted evasion of his own income taxes and those of his wife, respectively, for the year 1947 in violation of Section 145(b) of the Internal Revenue Code. The third and fourth counts charged Mrs. Mitchell with similar offenses. The fifth count

charged petitioners and Dr. Mitchell's bookkeeper, Iris M. Cowart, with conspiring to evade and defeat the Mitchell's income taxes for the year 1947, in violation of 18 U.S.C., Section 371. Mrs. Cowart was named as a co-conspirator but not as a defendant. (R. 3-8.) After a jury trial petitioners were found guilty as charged. (R. 22.) On May 12, 1953, Vaughn H. Mitchell was sentenced to a year's imprisonment and fined $25,000. (R. 34-35.) Dorothy Mitchell was fined $10,000 and placed on probation for five years. (R. 36-37.) The Court of Appeals affirmed. (R. 2025.)

The evidence to support the verdict may be summarized as follows:

Vaughn H. Mitchell is a physician and surgeon and Mrs. Cowart was his bookkeeper during 1947. (R. 265-266, 290-297.) In November 1946, Dr. Mitchell's income tax returns for the period 1942 through 1945 were examined by Revenue Agent Green, who informed the doctor that he had discovered large discrepancies between his actual gross receipts and those reported in his returns. The agent gave the doctor a preliminary estimate of $100,000 and stated that he had determined the existence of the discrepancy by totaling the doctor's bank deposits.[1] (R. 258-261.)

---

[1] Green's investigation extended back into earlier years and forward to 1946, and it was ultimately determined that Dr. Mitchell and his wife had failed to report income in the amount of $350,000 for the period from 1938 through 1946. (R. 262-263.) In May 1948 Dr. Mitchell made a payment of $185,000 designed to cover the 1942-1946 period. (R. 250-251.)

Two months later, in January 1947, intending to deceive the Government (R. 420), Dr. Mitchell instructed Mrs. Cowart to record receipts of cash payments from patients in two separate sets of books, one for the morning and one for the afternoon. During the remainder of that year Mrs. Cowart gave the cash receipts recorded in the morning books to Mrs. Mitchell, while those entered in the afternoon books were deposited in the bank as usual. The scheme was concealed from several other women who worked in the doctor's office, but was accidentally discovered by the receptionist, Mrs. Pierson, who was then asked to keep quiet about it. (R. 266-272, 418-423.) It was also concealed from revenue agents who were at that time visiting the office in connection with the 1942-1946 investigation. (R. 302-303.) In a further effort at concealment Mrs. Cowart destroyed numerous Kardex cards on which cash payments during 1947 had also been recorded. (R. 481-488.) According to Mrs. Cowart the amount thus delivered to Mrs. Mitchell was around $15,000. (R. 274.) Only the amounts recorded in the afternoon books were reported in the income tax return for 1947. (R. 126-129.) The morning books were delivered to Mrs. Mitchell by Mrs. Cowart in January 1948 shortly before the latter's resignation. (R. 278-281.) On February 16, 1949, Dr. Mitchell was indicted on charges of evading his income taxes for the 1942-1946 period. On the same day,

Mrs. Mitchell burned the books Mrs. Cowart had delivered to her.[2] (R. 556, 1471.)

In August 1949 another revenue agent, Barron, began an investigation of Dr. Mitchell's returns for 1947 and 1948. His suspicion having been aroused by the fact that the doctor's cash receipts for 1946 and 1948 were vastly in excess of those for 1947, he discovered, upon questioning Mrs. Pierson, the existence of the double set of cash receipt books. (R. 114, 119-120, 124, 131, 441-446.) In September 1949, the two Mitchells visited Mrs. Cowart and asked her not to testify against them. (R. 283-284.) On October 4, 1949, the agents told Dr. Mitchell that their examination of the Kardex files in his office revealed at least $10,000 additional receipts for 1947. The doctor assured them that all the cash receipt books and Kardex cards were still in the office and said he could not explain the shortage. (R. 526-527.) Ultimately, after two agents had worked for four months in an effort to reconstruct Dr. Mitchell's income from the available Kardex cards and cash receipt books, it

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[2] Dr. Mitchell was acquitted in July 1949 after a trial under the 1942-1946 indictment, although several of the jurors afterward stated that they believed him to be guilty. (R. 639.) An alleged attempt by Dr. Mitchell to tamper with the jury was thereafter investigated by the Government. This matter was injected into the present trial, and developed at great length, by the defense. (R. 617-649, 728; cf. also 922-923, 933, 950.)

A previous trial under the present indictment ended in a mistrial as the result of another alleged attempt to tamper with the jury. (R. 25-30, 45-55.)

was determined that he and his wife had failed to report income of at least $26,242.75. (R. 528-544.)

The defense admitted the secret use of two sets of cash receipt books, admitted that Mrs. Mitchell had received at least $8,770 from Mrs. Cowart during 1947, admitted that this was not reported in the returns, and admitted the burning of the books by Mrs. Mitchell. (R. 1171, 1245-1251, 1464-1472, 1606-1608, 1614.) Mrs. Mitchell claimed authorship of the scheme, but said that she had devised it to obtain money from her husband without his knowledge because of domestic difficulties. She denied any intent to evade taxes. (R. 1464, 1465, 1515-1516.) Dr. Mitchell denied all knowledge of the scheme. (R. 1604-1607, 1620-1622, 1632-1633.)

Petitioners now admit that $10,000 income was not reported for 1947.[3] (Pet. 10-11.) Both petitioners testified that they simply signed the 1947 returns as they were presented by Lukes, the accountant who prepared them, without understanding the basis on which they were prepared. (R. 1477-1479, 1570-1572, 1600, 1662.) Lukes testified that he was told by Mrs. Cowart, who assisted him in preparing the returns, that all receipts were deposited in the bank; that he was unaware of the double set of cash receipt books or the cash turned over to Mrs. Mitchell; and that he determined the

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[3] However, Sonnenberg, an expert accountant who testified for petitioners, computed the unreported income, first at approximately $26,000, almost the same as the Government's figure, and then at approximately $15,000. (R. 1346, 1356, 1369, 1394-1395, 1427-1436; cf. 104, 611-612, 1100, 1814-1815.)

gross receipts for the year by adding up the bank deposits, since, in view of the crude system of bookkeeping in the doctor's office, that seemed to be the method best calculated to obtain an accurate result. (R. 1068-1078, 1171, 1245-1255.)

ARGUMENT

1. Petitioners point to two passages in the trial court's charge to the jury and contend in effect (Pet. 2, 13-14, 15-22) that they were deprived of the defense of unintentional error.[4] Whatever be

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[4] The pertinent passages are as follows (R. 1941-1942, 1945):

> I instruct you, ladies and gentlemen, that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge to things that are put out in the open and are obvious to him and say, "I have no knowledge of such facts." He must exercise such intelligence as he has, and if the evidence shows that he intended to conceal tax liability from the government, then of course he was not acting in good faith.
>
> * * * * *
>
> Now, of course, the owner of a business or the practitioner of a profession need not be the actual bookkeeper to be familiar with the affairs and finances of that business. It will present a somewhat startling situation if a defendant charged by law with the duty of filing a return could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he had sponsored. Of course he would not be liable for innocent clerical mistakes, but he must be held to know that which it is his duty to know and which he solemnly promulgated, and it is for you to determine from all the evidence whether the defendants had knowledge of the falsity of these returns or not.
>
> The duty to file an income tax return is personal. It cannot be delegated to anyone. Bona fide mistakes should not be treated as false and fraudulent, of course.

the propriety of these instructions under other circumstances, we think they were not inappropriate here.

Petitioners presented two defenses at the trial. In the first place, Dr. Mitchell denied all knowledge of duplicate books and diverted cash, while his wife denied a tax evasion motive. As a second line of defense, petitioners, while admitting that $10,000 had been omitted from their returns, sought to account for this discrepancy on the grounds of bad bookkeeping, mistake by the accountant who prepared the returns, and inadvertence on their own part. But this was not a complete defense[5] for both of the accountants, Sonnenberg (footnote 3, *supra*, p. 8) and Lukes, who testified for petitioners at the trial (R. 1266-1280, 1330-1335), admitted that the amount of unreported income was actually considerably greater than $10,000.[6] Consequently, since the proof clearly established that there was unreported in-

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But no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else.

[5] In the cases of *Berkovitz* v. *United States*, 213 F. 2d 468 (C.A. 5) and *Hartman* v. *United States*, decided July 26, 1954, not yet reported (C.A. 8), on which petitioners rely, the defense of inadvertence and mistake was a complete defense.

[6] Petitioners themselves accounted for only $8,770 of the unreported income (supra, p. 8). Defense counsel argued strenuously to the jury that it was unnecessary for them to account for more than $10,000. (R. 1887-1892.)

come not explained by the defense of inadvertence, the critical issue before the jury was whether petitioners had wilfully devised the duplicate set of receipt books and had wilfully concealed gross income with the intent of evading their income taxes.

On the question of whether this admittedly existing scheme had been intentionally devised to evade taxes the trial court gave a long and careful instruction (R. 1941-1946) in which it was made clear to the jury that they were obliged to consider "all of the facts and circumstances shown by the evidence, including these multi-fold exhibits", (R. 1941) before arriving at an answer. As this Court has pointed out, the test of wilfulness in a tax evasion case is not only the presence of an evil motive, but also whether the conduct of the defendant is so unreasonable and ill founded, so marked by a careless disregard for the legality of his actions, as to give rise to an inference of bad faith. *United States* v. *Murdock,* 290 U. S. 389, 394-395, 396. Accordingly, it was proper for the court to instruct the jury that petitioners could not shut their eyes to the obvious facts of their financial situation, that petitioners had a duty to know what amounts they had reported and must be held to know those facts, and that it was the function of the jury to determine from all of the evidence whether petitioners had acted in bad faith or with careless disregard. The instruction imposed no presumption of intent. In the light of all the evidence and the entire instruc-

tion, it is inconceivable that the jury could have believed petitioners' story and yet have convicted them because it felt bound by the disputed passages in the charge to disregard the defense of inadvertence and mistake.

2. The trial court instructed the jury that all taxpayers are required by law to keep adequate records of income. (R. 1952.) At the trial, petitioners objected to this portion of the charge on the ground that it emphasized the presumption of negligence allegedly imposed by the portions of the charge discussed in the previous point. (R. 19, 21, 1957.) Shifting their position considerably, they now contend (Pet. 3, 23-24) that the instant passage permitted a conviction solely for acts proscribed by Section 145(a) of the Internal Revenue Code, whereas the indictment was returned under Section 145(b). The argument is without substance. This Court has held that failure to keep proper records is an element which can be considered by the jury in determining whether there has been an affirmative wilful attempt to evade income taxes. *Spies* v. *United States,* 317 U. S. 492, 499. There was evidence here of duplicate books and destruction of Kardex cards. The instruction was, therefore, relevant and proper.

3. Dr. Mitchell, as has been noted (*supra,* pp. 6-7, including fn. 2), had previously been tried and acquitted on charges of attempted income tax evasion involving the years 1942-1946. It is now contended (Pet. 3, 12-13, 24-26) that the trial

court violated established principles of *res judicata* by so instructing the jury as to permit them to speculate about the lawfulness of Dr. Mitchell's intent in understating his income in these previous years. The baselessness of the contention is shown by the unmistakable admonition in the court's charge (R. 1938-1939)—

> You are instructed that the guilt or innocence of Dr. Vaughn H. Mitchell on charges of tax evasion for the years 1942 to 1946, inclusive, is not to be considered by you * * *.

The *facts* of the 1942-1946 understatements were introduced into the present record not, as petitioners imply (Pet. 3, 25), by the Government, but by petitioners themselves. Agent Barron, the Government's first major witness, made no mention of these earlier years except to testify that his suspicions were aroused as to the correctness of the 1947 returns when he noted that cash deposits in that year were vastly exceeded by those in 1946 and 1948. (R. 119-124.) In cross-examination of the agent, petitioners introduced an exhibit which showed that over $157,000 had been assessed against them in additional taxes and penalties for the 1942-1946 period and that they had made a payment of $185,000, the obvious implication being that they had overpaid their taxes. (R. 249-251, 1307-1310.) Agent Green then testified as to his examination of the 1942-1946 returns in order to show that during that period Dr. Mitchell kept only one set of cash receipt books and deposited all

cash, and that the doctor had been informed that the understatements were determined by totaling the bank deposits. (R. 257-261, 303.) All this was evidence which was obviously relevant in establishing the 1947 scheme of evasion. The Government did not violate the rule of *Sealfon* v. *United States*, 332 U. S. 575, and *Emich Motors* v. *General Motors*, 340 U. S. 558, by attempting to reopen the issue of Dr. Mitchell's intent during the 1942-1946 period. Petitioners single out two sentences from the prosecutor's opening argument to the jury. But a study of those sentences in context, and of the prosecutor's other remarks on the subject, makes it clear that he was very careful to warn the jury that Dr. Mitchell's previous troubles with the Treasury Department could be considered only to the extent of the shadow of incredibility which they cast upon his claim of inadvertence in 1947.[7] (R. 65, 69-70, 1801-1805.)

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[7] In his closing argument to the jury the prosecutor said (R. 1923, 1924-1925):

> Now, we have had a second defense or distraction, which is what happened in 1942 to 1946, and Dr. Mitchell's successful defense in that case in the year 1949. And in the final argument you have heard, I believe, more about what happened in 1949 than what happened here in April, 1953, on this charge and in this Court and on these witnesses.
>
> * * * * *
>
> So what happened in 1942 to 1946 has no place in your deliberations. The result of that trial has no place in your deliberations because you are to deliberate on the evidence which was presented here in Court on the record before you.
>
> That is the way our trials are conducted.
>
> There is one circumstance, however, under which you

The speciousness of petitioners' argument is made manifest by the fact that they objected neither to the prosecutor's remarks nor to the trial court's instruction. It is asserted that objection to the charge would have been useless since the court cut defense counsel short. (Pet. 26-27, fn. 10.) We do not so read the record. The court cut short the legal argument, not the objections (R. 1757, 1957).

4. Nor is there merit in the contention (Pet. 3-4, 27-32) that the cross-examination of Mrs. Cowart was unduly restricted. There can be no doubt that she was an adverse witness so far as the Government was concerned. She was a former employee of the doctor and a close personal friend of his wife (R. 1450), and the doctor had treated her husband during his last illness (R. 827-828). At the doctor's request she refused for a full year to give any statement to the Government. (R. 284, 425, 505, 764.) She was a difficult witness for the prosecutor (R. 268, 274, 278, 280), a compliant one for the defense (R. 281, 770-771, 798). Her examination by the prosecutor covers about thirty pages

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can consider Dr. Mitchell's tax returns and tax practices for the years '42 to '46, and for the years '38 to '41, and that is when you consider his defense that what happened in 1947 was a nightmare, one of these peculiar combinations of circumstances which merely happened to entrap him, and in considering his defense that '47 was a complete accident, you can consider the returns that he made in '46, '5, '4, '2, '41, '40, '39 and '38. You can consider those on the question of whether '47 was a horrible accident. And you can consider those even though the Jury did return a verdict with respect to '42 to '46.

of the record (R. 265-287, 814-823), whereas the defense examination extends over one hundred and ten (R. 287-298, 746-813, 823-868).[8]

The scope of cross-examination rests within the sound discretion of the trial judge. *Glasser* v. *United States,* 315 U.S. 60, 83; *Alford* v. *United States,* 282 U.S. 687, 694. And although leading questions may normally be used in cross-examination, the court may refuse to permit them when the witness is shown to be biased in favor of the cross-examiner. III Wigmore, *Evidence* (3d ed., 1940), Secs. 770, 773, 915; 5 Jones, *Commentaries on Evidence* (2d ed., 1926), Sec. 2336; Underhill, *Criminal Evidence* (4th ed., 1935), Sec. 389; American Law Institute, *Model Code of Evidence,* Rule 105 (g), pp. 108-110. In the case upon which petitioners rely[9] (Pet. 28-29), the point was not carefully considered since the trial court's refusal to permit leading questions was found not to be prejudical. Furthermore, even if there were doubt as to the propriety of the ruling in the present case, it is quite clear, as the opinion of the Court of Appeals points out (Pet. v-ix), that the cross-examiner was not appreciably hampered. Petitioners fail to specify any instance in which the refusal to allow a leading question prevented defense

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[8] *United States* v. *Michener,* 152 F. 2d 880, 883-885 (C.A. 3d), upon which petitioners rely (Pet. 28, 30), is clearly not in point, for there the trial court struck the entire testimony of the Government witness involved and refused to allow any examination by the defense.

[9] *Arnette* v. *United States,* 158 F. 2d 11 (C.A. 4th), a one page *per curiam* opinion.

counsel from getting the information he desired from Mrs. Cowart.

Petitioners do contend that they were prevented on cross-examination from showing the circumstances under which Mrs. Cowart testified before the grand jury and from offsetting her damaging testimony with other testimony more favorable to them. But it was clear to the jury that Mrs. Cowart had herself been threatened with prosecution *prior* to the time she appeared before the grand jury [10] (R. 806-810); the trial judge, with prompting from defense counsel, explained the circumstances under which testimony is taken before the grand jury (R. 824-826); and, finally, the entire transcript of Mrs. Cowart's testimony was placed in evidence by petitioners themselves (R. 841-860). There was no restriction on the scope of cross-examination.

5. During cross-examination of Agent Whiteside, who had been in charge of the Government's investigation of petitioners' 1947 returns, questions were asked about pre-trial statements taken from Mrs. Pierson and Mrs. Cowart, and defense counsel demanded that he be allowed to inspect copies in the Government's possession. (R. 595-605.) Neither Mrs. Pierson or Mrs. Cowart, both of whom had previously testified for the Government (R. 265-287, 412-425, 511-513) nor Agent Whiteside himself,

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[10] In *Sandroff* v. *United States*, 158 F. 2d 623, 628-630 (C.A. 6th), cited by petitioners (Pet. 31), the trial court refused to permit cross-examination of a co-conspirator to show that he had been promised immunity.

had been questioned about these statements on direct examination. The trial court denied the requests, and petitioners now assert prejudicial error. (Pet. 4, 32.) This Court has held that, where such documents in the Government's possession have not been used by a witness in court, the defendant has no absolute right to inspect them, and "a large discretion must be allowed the trial judge". *Goldman* v. *United States,* 316 U.S. 129, 132. The defense must lay a foundation by showing that the requested statement contradicts the witness' testimony on the stand in material aspects. *Gordon* v. *United States,* 344 U.S. 414, 418, 419. See also *Asgill* v. *United States,* 60 F. 2d 776 (C.A. 4th); *United States* v. *Krulewitch,* 145 F. 2d 76, 79 (C.A. 2d); *United States* v. *Ebeling,* 146 F. 2d 254, 257 (C.A. 2d); *Shelton* v. *United States,* 205 F. 2d 806, 814 (C.A. 5th). No such foundation was laid here, and we submit that, in view of all the circumstances under which petitioners' requests were made, the trial court was well within the limits of its broad discretionary powers in refusing to grant them.

There had been a previous trial of this case [11] at which both Mrs. Pierson and Mrs. Cowart had testified (R. 451, 1863), yet no effort was made by petitioners to examine their statements in the interim between trials by means of a motion under Rule 16 or Rule 17(c), Federal Rules of Criminal

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[11] See *supra,* p. 7, footnote 2, second paragraph.

Procedure. Neither witness, as has just been pointed out, mentioned the statements on direct examination during the present trial. Mrs. Pierson was cross-examined at great length (R. 426-514) but nothing was done to show any contradiction between her prior statement and her present testimony (see particularly R. 480-482) and she was finally excused from court before Agent Whiteside had taken the stand (R. 514). Most of Mrs. Cowart's long cross-examination (R. 287-298, 746-813, 823-868) followed Whiteside's testimony, but no effort was made by petitioners to lay a foundation with this friendly witness for the use of her prior statement (R. 807-810), and the demand for her statement was not renewed despite the fact that, in refusing the previous request, the trial judge had pointed out that petitioners could get it "at the proper time" (R. 597-598). Furthermore, a copy was in the hands of Mrs. Cowart's own attorney (R. 935) whom she had engaged at the recommendation of one of the attorneys for petitioners (R. 492-497, 822, 999-1000). It may also be noted that the prosecutor offered to introduce the statements of both witnesses in evidence.[12] (R. 597, 604.)

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[12] Petitioners rely upon *Fryer* v. *United States*, 207 F. 2d 134 (C.A. D.C.), certiorari denied *sub nom. United States* v. *Fryer*, 346 U. S. 885. In that case, involving a pretrial demand for statements of witnesses, the Court of Appeals recognized the right of the trial court to deny an unreasonable request (p. 137), and the opinion does not necessarily conflict with the decision of the trial court here.

It is also urged (Pet. 4, 33-34) that defense counsel should have been allowed to examine a statement by Dr. Mitchell which the prosecutor used for the purpose of impeachment in cross-examination of the doctor (R. 1686-1691). The short answer is that the request was not renewed at the proper time, *i.e.*, at the conclusion of the cross-examination. (R. 1727.) Counsel for petitioners was entitled to see the document before Dr. Mitchell left the stand, but the court properly refused to interrupt the cross-examination. IV Wigmore, *Evidence* (3d ed., 1940), Sec. 1261; VI Wigmore, *op. cit.*, Sec. 1861. In such matters the trial court has a broad discretion. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 231-237.

6. There is no merit in the contention (Pet. 4, 34-35) that the trial court should have discharged Juror Hershler because of the opinion he had formed from reading newspaper reports of the first trial. (R. 56-63). The rule is that opinions founded on rumors or newspaper reports do not disqualify a juror if it appears to the court that the juror can, notwithstanding such an opinion, act impartially. An opinion which can be changed by evidence is not sufficient. *Holt* v. *United States*, 218 U.S. 245, 248; *Hopt* v. *Utah*, 120 U.S. 430, 432, 434, 435; *Reynolds* v. *United States*, 98 U.S. 145; *United States* v. *Dennis*, 183 F. 2d 201, 228-229 (C.A. 2d), affirmed, 341 U.S. 494. Juror Hershler's frame of mind appears clearly in the following passage (R. 58):

Q. [The Court] But, in other words, you are going to listen to the evidence, if you are selected here, and make up your mind when all the evidence is in and you have heard the arguments of counsel and the instructions of the Court; is that correct?

A. Correct.

7. Petitioners' last two contentions (Pet. 4, 35-37) require no more than passing notice. In order to counter the Government's evidence of the small amount of cash deposits in 1947 as opposed to 1946 and 1948, petitioners sought to present evidence of deposits in 1949 and 1950. It is quite true that subsequent events are sometimes relevant, but the test of admissibility is their probative value under all circumstances. *Johnson* v. *United States,* 318 U.S. 189, 195-196; *United States* v. *Stoehr,* 196 F. 2d 276, 281-283 (C.A. 3d), certiorari denied, 344 U.S. 826. Here, when the Government used the 1946-1947-1948 deposits chiefly to show the starting point of Agent Barron's investigation (*supra,* p. 7), what happened in 1949 and 1950 was of no moment and was properly excluded. On the other hand, evidence of Dr. Mitchell's income tax deficiencies for the 1938-1941 period was properly admissible, since petitioners had sought to convey the impression that by making a payment of $185,000 in 1948 (*supra,* pp. 5, 8-9, 13-14) they had actually paid everything the Government claimed they owed.

CONCLUSION

The decision of the court below is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
DAVID L. LUCE,
JOSEPH M. HOWARD,
KINSEY T. JAMES,
FREDERICK B. UGAST,
Special Assistants to the Attorney General.

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In the Supreme Court
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United States

OCTOBER TERM, 1954

No. 309

VAUGHN H. MITCHELL and DOROTHY MITCHELL,
Petitioners,

vs.

UNITED STATES OF AMERICA.

REPLY TO BRIEF IN OPPOSITION.

VALENTINE BROOKES,
ARTHUR H. KENT,
PAUL E. ANDERSON,
1720 Mills Tower, 220 Bush Street,
San Francisco 4, California,
Attorneys for Petitioners.

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FOREWORD.

When the brief in opposition was received by petitioners' counsel, there appeared to be insufficient time for preparing and filing a reply brief prior to the time the Court would act on the petition for certiorari. Moreover, the brief in opposition did not impress petitioners' counsel as containing any argument likely to result in the Court's denying certiorari.

Since, however, the Court has now recessed for two weeks without taking action on the petition for certiorari, counsel for petitioners have concluded that this reply brief should be filed.

1. The instructions on wilfulness.

This issue involves points 1 to 3, inclusive, of the petition for certiorari. The brief in opposition does not deny the existence of the conflict on which petitioners rely, but contends that the conflict is unimportant because petitioners would have been convicted even if the instructions held erroneous in other Courts of Appeals had not been given herein.

The first trial of this case ended in a hung jury (R. 2000).* A case so close on the evidence that a prior jury was dismissed because it was hopelessly deadlocked (R. 2000) is, we submit, an excellent example of one in which appellate courts should not be asked to speculate about what the jury might have done had a particular error not occurred. Cf. *Bollenbach v. United States* (1946), 326 U.S. 607.

Furthermore, contrary to assertions in the brief in opposition (pp. 8, 10), no defence witness acknowledged that the understatement of income exceeded the admitted figure of $10,000. Defence witness Sonnenberg attempted to reconstruct Dr. Mitchell's income on the accrual basis, to ascertain the maximum amount he might have received had he had no uncollected accounts, no reduced charges, and no charity work. (R. 1344-1346.) Petitioners' books and returns were on the *cash* basis, however. Therefore, Mr. Sonnenberg's reconstruction had no tendency to establish what petitioners' income actually was, and it was

*The jury which was dismissed because of a suggestion of possible tampering, to which the brief in opposition twice refers (pp. 7, 18, footnotes), was the second, not the first, jury empanelled to try this case.

offered by the defence for the limited purpose of showing up the error in the Government's reconstruction.

Mr. Lukes, the other certified public accountant whose testimony is referred to in the brief in opposition, insisted throughout that the understatement was only $10,000 (R. 1100, 1128, 1134-1137, 1217), and could not possibly exceed $11,700 (R. 1306).

Finally, even if petitioners' understatement had been conclusively established to be more than $10,000, the issue of petitioners' wilfulness would still remain. Petitioners denied knowledge of *any* understatement when their returns were filed. They denied personal responsibility for the condition of the records which brought about the understatement. The question of their criminal responsibility for these circumstances revolved about their intent, not the extent of the understatement, and the failure of the trial judge to instruct the jury correctly about the elements of intent (wilfulness) deprived the jury of the tools for determination of the central issue.

The conflict is therefore squarely present.

2. The res judicata issue.

This issue involves point 4 raised in the petition for certiorari.

The brief in opposition emphasizes (p. 13) the incomplete portion of the instruction in which the trial judge told the jury not to consider Dr. Mitchell's guilt *or innocence* on the charges brought against him for 1942-1946. This was error in itself. However, the instructions did not stop there. They proceeded to inform the jury that it could consider the evidence about conduct in those years

because it was "similar to (that) charged in the indictment . . . (and) sufficiently near and so related in kind as to throw light on the question of intent" (R. 1944). The latter instruction, in permitting the jury to draw an implication of guilt from prior conduct, means the exact opposite of what the brief in opposition evidently considers the incomplete extract it quotes to mean. The portion of the instruction quoted in the brief in opposition is complete when the rest of the sentence from which it is taken is added to it (R. 1938-1939):

> ". . . nor are you to consider for any purpose whatsoever the result of any previous trial."

The last quotation is certainly clear in meaning. It violates the rule of res judicata. The kindest view of the entire two paragraphs is that they are contradictory and ambiguous. Certainly they fail to guarantee to Dr. Mitchell that he not be convicted for 1947 because the jury accepted the prosecutor's contention that Dr. Mitchell was guilty of a pattern of unlawful conduct in 1942-1946 which persisted into 1947. He was entitled to such a guaranty, but instead he was left in jeopardy for not having reoffered his successful defence for those years.

He was entitled to a clear and explicit instruction, not that his innocence for prior years be ignored, but that it be accepted as an incontestible fact.

3. The restrictions on the examination of Mrs. Cowart.

This involves points 5 and 7, inclusive, of the petition for certiorari.

The fact the attempt to cross-examine Mrs. Cowart fills many pages of the record is not, contrary to the argu-

ment in the brief in opposition, proof that it succeeded in overcoming all the restrictions. The cross-examination was long because counsel tried to surmount the improper obstacles erected by the trial judge's rulings, but it was incomplete by the very nature of the restriction imposed on it.

Mrs. Cowart's testimony damaged petitioners. They were entitled to attack it, to lead Mrs. Cowart into inconsistencies and contradictions to destroy the weight of her testimony if they could. They were entitled to use leading questions because such questions constitute the technique best suited to test the truth of testimony. It is the technique which is the adverse parties' right, and the duration of attempts to find a substitute is not a measure of the substitute's efficacy.

But the government challenges us to show an instance where the denial of the right to lead shut off the testimony sought. By the nature of things, such a negative is not often demonstrable, but one instance appears at R. 795-799, where the following exchange appears:

> "Did Dorothy Mitchell say anything to you about being dissatisfied with her domestic affairs, her relationship, her marital relationship with her husband?"

This question was ruled out as leading. It was then paraphrased:

> "In the conversations you had with her, will you state now, as best you can, what they covered?"

This too was ruled out as vague, unidentified as to subject. After some argument with the judge, defence counsel asked:

"Did your conversation with Dorothy Mitchell cover the amount of space available in the house at 1870 Pacific?"

This question was ruled out as leading.

While defence counsel ultimately succeeded in developing Mrs. Mitchell's dissatisfaction with the Pacific Street property, he never did succeed in getting the witness to testify about her knowledge of Mrs. Mitchell's marital dissatisfaction. (R. 797-798.) This, then, is one instance of the restriction on leading questions operating to restrict the *scope* of the examination.

Moreover, it is clear that the trial judge's statement to the jury of the nature of grand jury proceedings (R. 825-826) was not an adequate substitute for a proper cross-examination about the nature of Mrs. Cowart's examination before the grand jury, if for no other reason than the fact the judge failed to point out that there was no cross-examination before the grand jury.

Finally, the brief in opposition does not even suggest that there was a rectification of the erroneous refusal to permit cross-examination about the effect on Mrs. Cowart of her husband's fatal illness.

4. The remaining issues.

Nothing said in the brief in opposition about the remaining issues appears to us to warrant reply on the question of whether certiorari should be granted.

CONCLUSION.

The writ of certiorari should be issued.

Dated, San Francisco, California,
November 26, 1954.

Respectfully submitted,
VALENTINE BROOKES,
ARTHUR H. KENT,
PAUL E. ANDERSON,
Attorneys for Petitioners.